IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 237 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Appellant
Versus
PARBAT ALIAS GHUSA NAGJIBHAI BHARWAD - Respondent

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Appearance :
MR LR POOJARI, Additional Public Prosecutor for the Appellant.
MS REKHA H KAPADIA for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 08/09/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The State of Gujarat has preferred the present appeal under Section 378 of the Code of Criminal Procedure against the judgment and order of acquittal passed by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 191 of 1995 whereby the learned Judge has acquitted the respondent for the offences punishable under Section 21 read with Section 29 of the Narcotic Drug and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act".)

2. The short facts giving rise to the present appeal are as under:-

Mr. Pravinsinh Nanbha Jethva, Police Sub-Inspector, PCB Rajkot, was informed on 22-07-1995 by Head Constable Mr. D.R. Pandit, Head Constable Mr. Hansrajbhai, Head Constable Abeysinh Jadeja as well as Police Constable Vijaysinh Zala and Police Constable Vinodrai Rathod that one auto-rickshaw, bearing registration No. GTX 2259 was to pass through Kishanpura Chowk, Race Course road, Rajkot with contraband articles. The rickshaw was occupied by the appellant and another accused - Parbat @ Ghusa Nagjibhai Bharwad. On receipt of the information, PSI Mr. Jethva called two *panch-witnesses* and informed that these two persons are selling narcotic drugs, and as they are in possession of the same, a raid is required to be carried out. Thereafter, the complainant along with *panch-witnesses* proceeded to

Kishanpura Chowk and reached Shalimar Ice-cream Stall at about 2.00 P.M. One person out of two was driving the auto-rickshaw and another person was sitting on the rear seat of the rickshaw. When the auto-rickshaw was stopped, the person sitting on the rear seat fled from the place, who, according to the prosecution, was identified by PW 8 Police Constable Vijaysinh Zala to be Parbat @ Ghusa Nagjibhai Barwad i.e. the present respondent, and the person, who was driving the auto-rickshaw was caught red-handed on the spot. The respondent was subsequently arrested after a long time. The charge-sheet in the matter came to be filed on 11-09-1995 and as the mater was exclusively triable by the Court of Sessions, the charge against the respondent was framed *vide* Exh. 1 for the offences punishable under Sections 21 and 29 of the Act. The respondent was read-over and explained the charge and he pleaded not guilty to the charge and, thereafter, the matter was set down for full-fledged trial before the Additional Sessions Judge, Rajkot.

3. During the course of examination, the prosecution has examined the following witnesses:-

(i) PW 1 Umeshbhai Laljibhai Doria at Exh. 8;
(ii) PW 2 Nashirbhai Jasabbhai at Exh. 9;
(iii) PW 3 Jayantibhai Bhanabhai at Exh. 10;
(iv) PW 4 Mukeshbhai Kanjibhai at Exh. 12;
(v) PW 5 Babulal Ramjibhai Madiya at Exh. 15;
(vi) PW 6 Madarsinh Halubha Zala at Exh. 18;

(vii) PW 7 Pravinsinh Nanbha Jethva at Exh. 20;

(viii) PW 8 Vijaysinh Mangalsinh Zala at Exh. 24;

(ix) PW 9 Abhesinh Balvantsinh Jadeja at Exh. 25; and,

(x) PW 10 Dwijendra Prasad Rajaram Pandit at Exh. 26.

The prosecution has placed reliance on the following documents in order to bring home guilt against the accused:

(i) Complaint given by PSI Mr. P. N. Jethva at Exh. 21;

(ii) *Panchnama* of the raid carried out by Mr. P. N. Jethva at Exh. 13;

(iii) *Panchnama* in respect of search of the house of another accused - Parbat @ Ghusa Nagjibhai Bharwad at Exh. 14;

(iv) Extract of the Station Diary at Exh. 16;

(v) Letter written by PSI Mr. Jethva, PCB to Police Inspector, Pranagar Rajkot in respect of further investigation after the seizure of *muddamal vide* Exh. 17;

(vi) Extract of the Station Diary wherein the recovery and the weight of the *muddamal* has been mentioned *vide* Exh. 19;

(viii) Letter written by PCB, Rajkot City to Regional Transport Office, Rajkot in respect of seizure of auto-rickshaw bearing No. GTX-2259 *vide* Exh. 27;

(ix) Letter addressed to Police Inspector, PCB Rajkot City from FSL along with the report at Exh. 30 and 31, respectively;

(x) Letter, whereby the Deputy Commissioner of Police, Rajkot was sent report under Section 57 of the Act *vide* Exh. 36;

(xi) Letter written to the Assistant Director, FSL, Gujarat State by the PSI, PCB, Rajkot City *vide* Exh. 37 and the receipt given by FSL in respect thereof at Exh. 32, etc.

4. At the conclusion of trial, further statement of the accused was recorded under Section 313 of the Code of Criminal Procedure. In his further statement, the appellant pleaded that he was falsely implicated in the commission of offence.

5. Considering the entire gamut of oral deposition and documentary evidence, the learned Additional Sessions Judge held that no case was made out against the respondent by the prosecution for the offences punishable under Sections 21 and 29 of the Act and, therefore, the respondent is required to be

acquitted forthwith in the matter. The learned Judge held that the *muddamal* was not found from the possession of the respondent and the ownership of the auto-rickshaw was also not proved by the prosecution and, therefore, the respondent is required to be acquitted. It was further held by the learned Judge that the prosecution has miserably failed to establish the involvement of the respondent in the commission of offence and since the entire link connecting the respondent with the commission of offence was not established, the respondent was required to be exonerated.

6. Mr. L. R. Poojari, learned Additional Public Prosecutor for the State of Gujarat, submitted that the learned Additional Sessions Judge has committed error in holding that there was no direct evidence against the respondent connecting him with the commission of offence punishable under Section 21 read with Section 29 of the Act. The learned Judge ought to have held that in view of the provisions contained in Section 29 of the Act, the respondent aided and abetted the other accused, namely, accused No. 1, Rahim @ Ghelo Noormohammed Sumra and, therefore, he cannot wriggle out from the offences punishable under Section 21 read with Section 29 of the Act. The learned Judge ought to have held that *muddamal* article, which was seized from the possession of accused No. 1, was from the auto-rickshaw which was of the ownership of the respondent and, therefore, he was equally responsible for the

offences under Sections 21 and 29 of the Act. Thus, the learned Additional Public Prosecutor submitted that the order of acquittal passed by the learned Additional Judge, Rajkot requires to be set aside *qua* the respondent and the appellant be convicted under the provisions of Section 21 read with Section 29 of the Act.

7. Ms. Rekha Kapadia, learned Advocate for the respondent, submitted that the prosecution had miserably failed to prove the involvement of the respondent in the commission of offence under Section 21 read with Section 29 of the Act and, therefore, the learned Judge has rightly acquitted the respondent. The learned Advocate further submitted that no *muddamal* was recovered from the possession of the respondent so as to indicate his involvement in the commission of offence under the provisions of the Act and, therefore, the learned Judge has rightly acquitted the appellant and, therefore, the order of acquittal requires to be upheld by this Court. The learned Advocate further submitted that even the ownership of the auto-rickshaw, which was seized by the Investigating Agency, was not conclusively proved by the prosecution as that of the respondent and, therefore, even on that ground, the respondent cannot be convicted and the learned Additional Sessions Judge has rightly held that the ownership of the auto-rickshaw was not proved by the prosecution and, therefore, the order passed by the learned Judge exonerating the respondent requires to be upheld.

8. This Court has heard Mr. L. R. Poojari, learned Additional Public Prosecutor for the appellant-State and Ms. Rekha Kapadia, learned Advocate for the respondent-accused, at length and in great detail. This court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. Taking into consideration the entire gamut of oral deposition and the documentary evidence adduced in the present case, the respondent was not found in possession of the *muddamal* article and, therefore, in our view, he was rightly acquitted by the learned Additional Sessions Judge. Even the ownership of the auto-rickshaw, in which the respondent was travelling was not conclusively established by the prosecution as that of the respondent, and, therefore, in view of the doubt raised by the documentary evidence and the oral deposition, the respondent was acquitted by the learned Additional Sessions Judge and we do not see any reason to interfere with the said order of acquittal. The learned Additional Sessions Judge has discussed the deposition of Vijaysinh Mangalsinh Zala, who was examined vide Exh. 24, and held that, as per the deposition of Vijaysinh Mangalsinh Zala, the respondent ran away from the auto-rickshaw and he, thereafter, could not be caught by the

Investigating Agency. On perusal of the cross-examination, it is clear that there was no identification parade and the *muddamal* article was not seized from the custody of the respondent. Therefore, in absence of seizure of the *muddamal* article and non-establishment of ownership of auto-rickshaw, the respondent was acquitted. Save and except the aforesaid deposition, there is no other evidence on record to indicate the role played by the respondent in the commission of offence or the involvement of the respondent in the commission of offence.

10. This is an acquittal appeal in which the Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had the opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so in view of the decisions rendered by the

Supreme Court in the cases of (1) **Girija Nandini Devi & Others Vs. Bijendra Narain Chaudhari, AIR 1967 SC 1124**, and (2) **State of Karnataka Vs. Hema Reddy and Another, AIR 1981 SC 1417**.

11. In view of the aforesaid facts and circumstances, the respondent, in our view, was rightly exonerated by the learned Additional Sessions Judge, Rajkot District and, therefore, we do not see any reason to interfere with the said order passed by the learned Judge. Therefore, the appeal preferred by the State of Gujarat is liable to fail. Hence, the same is dismissed. Bail Bond shall stand cancelled.

[ANIL R. DAVE, J.]

[H. B. ANTANI, J.]

/shamnath